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No. 00-844

In the Supreme Court of the United States

CHARLES GILBERT GIBBS, *et al.*,
Petitioners,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR, *et al.*,
Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF AMICUS CURIAE FOR THE NATIONAL ASSOCIATION OF HOME BUILDERS IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether the Commerce Clause authorizes the federal government to criminalize or otherwise regulate wholly intrastate, noncommercial interactions between humans and wild animals on private property.

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INTEREST OF THE AMICUS CURIAE*

The National Association of Home Builders (NAHB) represents 203,000 builder and associate members throughout the United States and is affiliated with some 850 state and local associations in all 50 states. NAHB's members include not only people and firms that construct and supply single family homes, condominiums, and apartments, but also commercial and industrial builders, remodelers, land developers, and land planners. NAHB is the voice of the American shelter industry.

NAHB's members are vitally dependent upon their ability to make economic use of their land free from unreasonable federal restrictions, whether those restrictions are imposed under the Endangered Species Act, as in this case, the Clean Water Act, or other federal regulatory schemes. Accordingly, NAHB has participated in this Court as an *amicus* or a party in cases questioning the constitutional propriety, under the Commerce Clause, of federal restrictions on land use. See, e.g., *National Association of Home Builders* v. *Babbitt*, No. 97-1451; *Solid Waste Agency of Northern Cook County* v. *U.S. Army Corps of Engineers*, No. 99-1178.

The federal prohibition on the "taking" of members of threatened or endangered species has been very broadly defined to extend to "habitat modification" and other activities that "harm" the listed animal or plant, including by interfering with its feeding, breeding, or other habits. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687 (1995). As a result, the taking prohibition greatly impacts a landowner's ability to develop the land or to make *any* economic use of it that conflicts with the needs or preferences of the listed species.

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* This brief was not written in whole or in part by counsel for any party and no one other than NAHB made a monetary contribution to its preparation. The written consents of the parties to the filing of this brief have been filed with the Clerk.

For residential and commercial developers, the presence of an endangered or threatened species on land either rules out development altogether or forces the developer into costly and time consuming administrative and court proceedings. See, e.g., *National Association of Home Builders* v. *Babbitt*, 130 F.3d 1041 (D.C. Cir. 1997) (construction of a public hospital was halted, at a cost of more than $3.5 million to taxpayers, and improvement of a critical traffic intersection to serve the hospital was prevented, because the project would interfere with the habitat of the Delhi Sands Flower-Loving Fly); Cf. *City of Monterey* v. *Monterey Dunes, Ltd.*, 526 U.S. 687 (1999) (possible presence of Smith's Blue Butterfly habitat barred residential development through five years of administrative proceedings and 13 years of litigation). These costs and delays in turn impact housing affordability and availability. See Advisory Commission on Regulatory Barriers to Affordable Housing, *"Not In My Backyard": Removing Barriers to Affordable Housing* (1991) ("environmental protection legislation and associated regulations * * * often unnecessarily raise the cost of housing").

The NAHB believes that it can illuminate the need for this Court's immediate review of the question presented in the petition and the harmful consequences of leaving the Fourth Circuit's erroneous decision in this case unreviewed. Allowing the federal government to determine what a person may legitimately do on his or her own property, when that conduct bears no substantial relation to interstate commerce, is flatly at odds with this Court's recent decisions concerning the scope of the commere power. It is not what the Framers of our Constitution contemplated when they conceived a federalist scheme of limited, enumerated federal powers and reserved state authority.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Department of the Interior regulation at issue in this case prevents landowners in eastern North Carolina from harassing, harming—even modifying the habitats—of red wolves that are located on private land. Pet. App. 6a; 50 C.F.R. § 17.84(c)(2). The red wolf does not inhabit eastern North Carolina as a result of natural migration, but has been reintroduced to the State by the federal government. Pet. App. 5a. Of the approximately 75 red wolves that now live in North Carolina, over one-half, about 41 wolves, now reside on private land. *Ibid.* The Secretary's "takings" regulation prevents landowners from interfering with the red wolves living on their land, despite the obvious threat that wolves pose to the personal safety of landowners and their families and to the safety of household pets and livestock, and despite the severe interference with property rights that occurs when landowners may not use their property as they wish because to do so would interfere with the red wolf's preferences. Recognizing these problems, the State of North Carolina has adopted a law to "allow the trapping and killing of red wolves by owners of private land." 1994 N.C. Sess. Laws Ch. 635; Pet. App. 7a, 62a-63a.

After passing resolutions opposing the reintroduction of red wolves, two North Carolina counties, joined by two individual plaintiffs, challenged the takings regulation as exceeding Congress' power under the Commerce Clause. The Fourth Circuit upheld the regulation as a valid exercise of the commerce power.

The majority, over Judge Luttig's dissent, first concluded that "the taking of a red wolf on private land" is itself "economic activity" because "[t]he protection of commercial and economic assets is a primary reason for taking the wolves. Farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable

livestock and crops." Pet. App. 15a. Because the taking of red wolves was economic activity, the majority held, it could be aggregated under *Wickard* v. *Filburn*, 317 U.S. 111 (1942), to arrive at the "significant" impact on commerce essential under this Court's decisions to justify federal regulation.

In the alternative, the majority held, the regulation was within the commerce power because it "is closely connected to a variety of interstate commercial activities"—namely "red wolf related tourism," "scientific research," and "commercial trade in [wolf] pelts." Pet. App. 15a-16a. The court considered it enough that red wolves might one day produce significant tourism to North Carolina, that scientific research might one day find a commercial use for wolves, or that trade in wolf pelts might one day be reestablished. *Id.* at 17a-20a.

I. The Fourth Circuit's decision cannot be reconciled with this Court's recent precedents or any reasonable conception of the federal government as one of limited, enumerated powers. In striking down federal statutes in *United States* v. *Morrison*, 120 S. Ct. 1740 (2000), and *United States* v. *Lopez*, 514 U.S. 549 (1995), this Court emphasized that the commerce power is subject to real limits and cannot be stretched to reach every matter in which the federal government claims there is some national interest. Contrary to this Court's careful articulation in *Lopez* and *Morrison* of those limits on the commerce power, the Fourth Circuit majority here upheld federal regulation of purely intrastate activity that cannot itself plausibly be regarded as commercial, and that has no discernible impact on interstate commerce except through a lengthy and impermissibly speculative chain of causation.

First, the majority by fiat declared that conduct that is merely *associated* with economic activity in *some instances* is itself "economic activity" sufficient to trigger *Wickard* aggregation. We explain in Part I that this Court has made clear that the Commerce Clause permits the regulation of purely intrastate

conduct "only where that activity is economic in nature." *Morrison*, 120 S. Ct. at 1751. The Fourth Circuit majority vastly expanded the concept of "economic activity" to include activity that is not economic itself, but that is in some way related to an economic transaction. That expansive view of the commerce power would extend federal authority to reach local and domestic activities and would eliminate all distinctions between the proper subjects of state and federal regulation.

Second, the court of appeals found the takings regulation justified by the mere speculative possibility of wolf tourism, scientific research about the red wolf, and trade in wolf pelts. But as this Court explained in *Lopez*, an activity does not "substantially affect" interstate commerce if one must "pile inference upon inference" to establish a nexus between the regulated activity and interstate commerce. 514 U.S. at 567. Instead, the Constitution requires some "concrete tie to interstate commerce"—something that is singularly lacking in this case. *Ibid.*

II. In addition, the lower courts have been seriously divided about the proper scope of Congress' power to restrict private action on private land in order to protect wildlife that has no established commercial utility or effect. The application of federal power to species that are not commercially exploited and that do not substantially affect commerce calls for this Court's immediate review to provide guidance to the lower courts.

III. The Fourth Circuit's decision is particularly subversive of this Court's efforts to restore the Commerce Clause to a meaningful constraint on federal authority. This Court's decision in *Lopez* had remarkably little impact in the lower federal courts, which paid lip service to that ruling while repeatedly upholding federal regulations with no effect on interstate commerce. The Fourth Circuit's post-*Morrison* decision in this case—a decision from which Judge Luttig

vigorously dissented on the ground that the majority's "conclusions are not even arguably sustainable under *Lopez* [and] *Morrison*"—demonstrates that even the reiteration in *Morrison* of outer boundaries to the commerce power has not been enough to convince lower courts that federal authority is constrained. The majority below continued to maintain a rearguard action against the logic of *Lopez* and *Morrison*, employing precisely the same tenuous and conjectural theories about how activities affect commerce that this Court has now twice rejected. This Court should grant review to correct the lower courts' tendencies to distort and manipulate the Commerce Clause tests in *Lopez* and *Morrison*.

Review is also appropriate now because determining the propriety of federal prohibitions on taking listed species, on private land, when those species have no commercial use or impact is of enormous practical importance to *amicus* home builders and to all landowners. The presence of an endangered species on private land delays or halts the development of land and causes substantial additional expense for private landowners and developers who are prevented from taking rational steps to manage or remove the protected species. Were the prohibitions at issue in this case not unconstitutional under the Commerce Clause, they would constitute a physical taking of private property that would require just compensation under the Fifth Amendment.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT CERTIORARI BECAUSE THE FOURTH CIRCUIT'S RULING SQUARELY CONFLICTS WITH THIS COURT'S DECISIONS IN *LOPEZ* AND *MORRISON*

This Court's recent ruling in *Morrison* underscored what the Court had firmly announced in *Lopez*: that "even under our modern, expansive interpretation of the Commerce Clause, Congress' regulatory authority is not without effective bounds."

Morrison, 120 S. Ct. at 1748. After *Morrison*, there can be no doubt that the federal government may not regulate purely local, non-commercial activity when the impact of that activity on interstate commerce may be deemed "substantial" only through a creative chain of speculation and inferences. Yet this is precisely what the court of appeals in this case permitted the Secretary to do. The court of appeals' impermissible expansion of the Commerce Clause, on an issue of vital importance to private landowners and to our Nation's polity, calls for this Court's intervention.

A. The Fourth Circuit Erred In Concluding That Red Wolf Taking Is Economic Activity Under This Court's Standards In *Lopez* And *Morrison*

This Court has made clear that Congress' exercise of its commerce power must have as its purpose the regulation of *commercial* activity. "[T]hus far in our Nation's history, our cases have upheld commerce clause regulation of intrastate activity only where that activity is *economic in nature*." *Morrison*, 120 S. Ct. at 1751 (emphasis added). It is not enough for the regulated activity to be connected in some general sense to an economic enterprise; instead, the particular regulated activity must itself be commercial in nature. See *Lopez*, 514 U.S. at 565 (observing that "depending on the level of generality, any activity can be looked upon as commercial").

While the majority of the Fourth Circuit paid lip service to this principle, it strained it beyond the breaking point when it held that taking red wolves is "in a meaningful sense economic activity" because "[t]he protection of commercial and economic assets"—livestock and crops—"is a primary reason for taking the wolves." Pet. App. 15a. The fact that, in some cases, "farmers and ranchers take wolves mainly because they are concerned that the animals pose a risk to commercially valuable livestock and crops" (*ibid.*), does not make the taking of red wolves commercial activity under the standards set forth in

Morrison or *Lopez*. The Secretary's regulation is not limited to takings to protect cattle or livestock or other commercial assets. To the contrary, it applies broadly to all red wolf takings in North Carolina, regardless of the reason for the taking, so long as they do not fall within a few specified exceptions. See 50 C.F.R. § 17.84(c). Without an "'express jurisdictional element which might limit its reach to a discrete set of [takings] that additionally have an explicit connection with or effect on interstate commerce'" (*Morrison*, 120 S. Ct. at 1751), the fact that the red wolf takings could, in some cases, have an economic purpose, broadly conceived, is irrelevant.

Beyond that, the notion that anything done to protect and promote commerce is itself commercial activity goes much too far. If every such activity were within the commerce power, the federal government could regulate an enormous range of conduct, from personal savings earmarked for purchases, to any productivity-enhancing choice such as eating well or exercising, to scaring crows and mice away from seedling crops, to how much vacation a self-employed builder may take. Taken to its logical conclusion, the court of appeals' "protecting items in commerce" rationale would substantially overlap with and be just as expansive—and just as destructive of our constitutional order—as the "productivity" rationale rejected in *Lopez* and *Morrison*.

Putting aside this improper rationale, it is clear that taking red wolves is not commerce. There is no suggestion in the lower court's opinion, nor anywhere in the record, that the red wolf presently has a commercial value. The court explicitly acknowledged that any sort of commercial trade in pelts occurred "primarily in the nineteenth century" (Pet. App. 21a), and that there is no present market for red wolf products. The regulation "by its terms has nothing to do with 'commerce' or any sort of economic enterprise, however, broadly one might define those terms." *Lopez*, 514 U.S. at 561.

B. The Court Of Appeals Erred In Finding A Substantial Impact On Interstate Commerce Based On Speculative Future Commercial Effects.

The Court of Appeals also held that red wolf takings are within the commerce power because they "implicat[e] a variety of commercial activities": "red wolf tourism," "scientific research," and "commercial trade in red wolf pelts." Pet. App. 14a. In each case these supposed effects on commerce are speculative, not substantial. There is no evidence that red wolf tourism is significant, or that it would be impacted in any way by taking wolves on *private land*, where tourists may not go. See *id.* at 48a, 50a. That some few scientists study red wolves clearly does not amount to a substantial impact on commerce, and certainly not where there has been no showing whatever that the science involved has commercial applications of any kind. See *id.* at 48a-49a. There is no trade in wolf pelts, and there has been none since the 1800s. See *id.* at 49a. And it is purely speculative to suppose that even if *all* 41 wolves located on private land were taken, commerce would be *substantially* affected when about an equal number of introduced red wolves remain on public land.

In any event, looking to the three "effects on commerce" identified by the court of appeals stretches the concept of "economic activity" so far beyond true "'commercial intercourse'" (*Lopez*, 514 U.S. at 553) as to make the concept essentially meaningless. To find each supposed commercial effect the court had to "pile inference upon to inference in a manner that would bid fair to convert congressional authority under the Commerce Clause to a general police power." *Lopez*, 514 U.S. at 567.

For example, the majority's reasons for finding an impact on interstate tourism involves the following steps: *If* none of the 41 wolves living on private land are taken, this *could* lead to "the recovery of the red wolf and increased visitor activities" (Pet.

App. 17a), which *might* lead to an increase in tourist dollars spent in North Carolina, which "*could* result in a significant regional economic impact." *Id.* (emphasis added). Each of the court's other rationales involve an equally fanciful "but-for causal chain from the initial [taking] * * * to every attenuated effect upon interstate commerce." *Morrison*, 120 S. Ct. at 1752. As Judge Luttig observed in his dissent (Pet. App. 50a),

> [T]he number of inferences (not to mention speculation) necessary to discern * * * [by taking red wolves] a substantial effect on interstate commerce is exponentially greater than the number necessary in *Lopez* to show a substantial effect on interstate commerce from the sale of guns near schools or in *Morrison* to show a substantial effect an interstate commerce from domestic assault.

If the sort of remote and speculative connections to commerce relied on by the Fourth Circuit were enough to ground federal power, nothing would escape Washington's control. There is tourism related to every conceivable hobby and interest; virtually no human act goes unstudied by some scientist somewhere; and virtually every object may be sold or bartered at some point. On the Fourth Circuit's theory, *every* human endeavor would "implicat[e] a variety of commercial activities." Brushing one's teeth implicates the purchase of a toothbrush and toothpaste. The Fourth Circuit apparently would permit the federal government to regulate how many times a person brushes his or her teeth a day on the theory that that will affect how many toothbrushes and tubes of toothpaste will be purchased each year. The Fourth Circuit in this case failed to demand the "'close and substantial relation to interstate commerce'" that this Court has required. *Lopez*, 514 U.S. at 555; see, e.g., *Maryland* v. *Wirtz*, 393 U.S. 183, 196 n.27 (1968) ("a relatively trivial impact on commerce [may not be used] as an excuse for broad general regulation of state or private activities"); *Gulf Oil Corp.* v. *Copp Paving*, 419 U.S. 186, 198 (1974) (a "chain of connection" that "ha[d] no logical

endpoint" resulted in "nebulous" jurisdictional limits and did not provide an acceptable "'nexus' to commerce"); *FERC* v. *Mississippi*, 456 U.S. 742, 758 n.23 (1982) (Congress may not "regulate in an area that is only tangentially related to interstate commerce").

This Court in *Morrison* squarely rejected the notion that the Commerce Clause permits federal regulation of any local activity as long as there exists some conceivable connection, however tenuous, between the activity and interstate commerce. The decision of the court of appeals repudiates that principle, and would obliterate the "distinction between what is truly national and what is truly local." *Lopez*, 514 U.S. at 567-68. Stripped of the majority's spurious connections to interstate commerce, the regulation challenged here relates to a purely local, non-economic matter: taking a small number of artificially-introduced wolves, which are located solely in a small part of North Carolina, and which are located solely on private land. See Pet. App. 52a-53a.

II. OVER FREQUENT DISSENTS, THE LOWER COURTS HAVE NOT BEEN ABLE TO AGREE ON A COMMERCE CLAUSE BASIS FOR THE ESA'S BROAD TAKE PROHIBITIONS.

There is substantial disagreement among federal appeals court judges regarding whether the ESA's take provision is constitutional under the Commerce Clause. Each of the two decisions upholding the prohibition after *Lopez* includes a vigorous dissent. See Pet. App. 46a (Luttig, J., dissenting); *National Association of Home Builders* v. *Babbitt*, 130 F.3d at 1060 (Sentelle, J. dissenting). There is also substantial disagreement among those judges who believe that the take provision is within the commerce power as to the rationale for sustaining the provision. See Pet. App. 14a-26a; *National Association of Home Builders*, 130 F.3d at 1052 (Wald. J.); *id.* at 1058-59 (Henderson, J.) (setting forth three different theories). A third

case upholding the take provision as applied to wholly intrastate, non-commercial listed species is currently on appeal to the Fifth Circuit. *Shields* v. *Babbitt*, No. 99-CA-040 (W.D. Tex., July 12, 2000), appeal pending, No. 00-50839 (5th Cir.). Absent this Court's guidance, disagreements about this recurring issue will certainly continue.

The Fourth Circuit's decision in this case and the D.C. Circuit's decision in *National Association of Home Builders* have failed to produce any consensus about a constitutional rationale for wildlife taking. There is little consensus, even, about whether the appropriate Commerce Clause analysis lies under the "channels" or "effects" jurisdiction. Compare Pet. App. 11a (the Secretary's taking regulation "is 'not a regulation of the use of the channels of interstate commerce'") and *National Association of Home Builders*, 130 F.3d at 1058 ("The statutory protection of flies is not a regulation of the 'use of the channels of interstate commerce'") (Henderson, J., concurring) with *id.* at 1046 ("Application of [the statutory taking provision] to the Fly can be viewed as a proper exercise of Congress' Commerce Clause power over * * * the use of the 'channels of interstate commerce'") (Wald, J.).

Even where appellate judges can broadly agree that the taking prohibition has a substantial economic effect on interstate commerce, they cannot agree on the basis for their conclusions. The majority in this case, for example, found that the Secretary's regulation of red wolf takings had a substantial interstate commercial effect because such takings might affect future markets for wolves (either a tourist market, or a research market, or a market in wolf pelts). That future market, the court concluded, might one day have a substantial impact on interstate commerce. Pet. App. 17a-21a.

In contrast, Judge Wald in *National Association of Home Builders* found that application of the take provision to the Delhi Sands Flower-Loving Fly "prevents the destruction of

biodiversity and thereby protects the current and future interstate commerce that relies upon it." 130 F.3d at 1052. To reach this conclusion, Judge Wald looked at the effect of takings on *all* endangered species, not merely their effect on the Fly, and concluded that "the aggregate extinction of endangered species will have a substantial effect on interstate commerce." *Id.* at 1054 n.14. While Judge Henderson agreed in her concurrence that the takings prohibition could be upheld based on a biodiversity rationale, she concluded that the extinction of a single species was adequate to find a substantial impact on interstate commerce, "[g]iven the interconnectedness of species and ecosystems." *Id.* at 1059. Both Judge Wald's and Judge's Henderson's reasoning could have been applied equally well in this case (and in *any* case involving endangered or threatened species) to seek to justify federal regulation; *yet the Fourth Circuit adopted a different approach.*

Not only have the judges upholding statutory and regulatory take provisions failed to agree on a constitutional basis, but each of their opinions has been vigorously attacked by a dissenting judge. As Judge Luttig explained in his dissent in the present case, the majority's rationales for upholding the regulation "are not even arguably sustainable under *Lopez* [and] *Morrison*" Pet. App. 49a. Likewise, Judge Sentelle, in *National Association of Home Builders*, criticized the notion that Congress' may regulate purely intrastate takings of wildlife that have no inherent commercial value based "upon the purely speculative future impact of an action with no demonstrable impact at all." 130 F.3d at 1065; see also Pet. App. 50a ("The number [of inferences] (and the speculation) is even greater than that necessary in *Wickard* v. *Filburn*, 317 U.S. 111 (1942)"—a case this Court has described as "perhaps the most far reaching example of Commerce Clause authority over intrastate activity," *Lopez*, 514 U.S. at 560). Despite extended discussion of this Court's precedents, federal appellate judges have not been able to apply the Court's standards in any coherent manner.

Given the diversity of opinion already on display among judges of the courts of appeals and the extensive opinions that already explore the issue presented in this case, there is no need for this Court to await a formal split among the circuits. This Court's review is necessary now to clear up the uncertainty pervading the lower courts, and to halt a vast and constitutionally unauthorized extension of federal power.

III. THE QUESTION PRESENTED IS IMPORTANT FOR OUR CONSTITUTIONAL ORDER AS WELL AS FOR PRIVATE LANDOWNERS

The Fourth Circuit's decision subverts this Court's efforts to restore the Commerce Clause as a meaningful constraint on federal power. The landmark decision in *Lopez* has had little impact in the lower federal courts, which continue to uphold federal regulation of activities with only remote effects on interstate commerce. Though one might have hoped that this Court's reaffirmation of the *Lopez* approach in *Morrison* would have brought home to the lower courts that rubber-stamping federal regulation is no longer appropriate, the decision below demonstrates that the message has not yet been driven home.

As Judge Luttig pointed out, the majority's opinion in this case was written by Judge Wilkinson, who had previously dissented from the Fourth Circuit decision that this Court affirmed in *Morrison*. Pet. App. 53a. In that dissent, Judge Wilkinson had characterized *Lopez* as an example of "contemporary judicial activism." See *ibid.* Perhaps not coincidentally, as Judge Luttig observed, "the expansive view of the Commerce Clause expressed by the majority [in this case] is closely akin to that separately expressed by Justice Breyer in his dissent in *Lopez* and Justice Souter in his dissent in *Morrison*." *Id.* at 51a. In a matter so important as the proper scope in our constitutional system of federal power over local matters, paying lip service to this Court's decisions while avoiding their necessary consequences should not be

tolerated—but will likely continue unless this Court intervenes to provide the lower courts with further guidance.

This case has not only substantial constitutional significance, but also immense practical importance to private landowners. The presence of any endangered or threatened species on private land either halts development completely or forces the landowner to engage in costly and time-consuming administrative proceedings (and litigation). See *National Association of Home Builders*, 130 F.3d at 1060 (construction of hospital derailed at cost of $3.5 million to taxpayers because the project might interfere with the listed Delhi Sands Flower-Loving Fly) (Sentelle, J., dissenting). The ESA's taking prohibitions put at risk both private economic and commercial development, including *amicus'* members efforts to provide affordable housing, and local public projects. See *ibid.* ("Construction planning and projects, including an electrical substation and housing developments, have also been threatened, impeded, or prohibited because of the fly"). Private development and public projects help local economies by creating jobs and increasing the local tax base; such benefits should not be lost to federal regulation that has absolutely no valid constitutional basis.

Amicus has already made known to this Court the harm to its members caused by such broad restrictions in its briefs in *National Association of Home Builders* v. *Babbitt*. So have small landowners and families dependent on the forest product industries. See *Babbitt* v. *Sweet Home Chapter of Communities for a Great Oregon*, 515 U.S. 687, 692 (1995). More recently, a federal district court in Texas found that landowners violated the ESA's take prohibition by pumping water from a local aquifer to irrigate farmland and feed livestock. *Shields* v. *Babbitt*, No. 99-CA-040, slip op. at 8 (W.D. Tex., July 12, 2000). Because withdrawal of the water "alter[ed] the aquatic habitat" of several endangered species, the Court concluded that the use of water from the aquifer constituted a taking under

the ESA. *Id.* at 4. No industry or individual dependent on the use of land for a living is safe from the excesses of the federal government under the ESA's take provision and implementing regulations like that at issue here.

Finally, an additional reason to address the question presented sooner rather than later is that striking down the take prohibition on Commerce Clause grounds would avoid serious constitutional issues under the takings clause of the Fifth Amendment. Rules requiring that introduced animals be allowed to wander over private property, at will and unmolested, result in no less a physical occupation of the land than the cable box held to be a taking in *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). There is no legally relevant difference between a regulation that requires a landowner to permit wolves to "pass to and fro" across its property or establish a home there and a regulation that gives *people* that right, which this Court held to be a taking in *Nollan* v. *California Coastal Commission*, 483 U.S. 825, 832 (1987) (a compensable "permanent physical occupation" occurs when government gives the public a "continuous right to pass to and fro, so that the real property may continuously be traversed"). See, e.g., Harrison, *The Endangered Species Act and Ursine Usurpations: A Grizzly Tale of Two Takings*, 58 U. Chi. L. Rev. 1101, 1114 (1991); *Christy* v. *Lujan*, 490 U.S. 1114, 1115-1116 (1989) (White, J., dissenting from denial of certiorari). The probability that enforcement of the take provision against private landowners acting against listed species located on their private property will result in the United States becoming liable to pay significant compensation provides another reason for this Court to address the constitutionality of the take provision now.

CONCLUSION

For the foregoing reasons, and those set forth in the petition, this Court should grant the petition for writ of certiorari.

Respectfully submitted.

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